Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-318

JOSEPH F. SHANAHAN,

ROBERT J. CORNELL, Petitioners

v.

NEW JERSEY STATE BOARD OF EDUCATION, et al
Respondents

PETITION FOR A WRIT OF CERIORARI TO THE
SUPERIOR COURT OF
NEW JERSEY ~~SUPREME COURT~~
APPELLATE DIVISION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

Joseph F. Shanahan,

Robert J. Cornell, Petitioners

v.

New Jersey State Board of Education, et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE NEW JERSEY SUPREME COURT

Joseph F. Shanahan and Robert J. Cornell petition for a writ of certiorari to review the order of the Supreme Court of New Jersey entered in the above entitled case on June 4, 1975.

OPINIONS BELOW

The order of the Supreme Court of New Jersey denying the petition for certification, dated June 4, 1975 appears in the Appendix hereto at Appendix A.

The decision of the Superior Court of New Jersey, Appellate Division dated March 6, 1975 appears in the Appendix

hereto at Appendix B.

The decision of the State Board of Education dated March 6, 1974 (City of Lambertville) appears in the Appendix hereto at Appendix C.

Relevant findings from the decision of the State Commissioner of Education dated May 11, 1972 (pp. 10-13) appear in the Appendix hereto at Appendix D.

JURISDICTION

The order of the Supreme Court of New Jersey denying the petition for certification was entered on June 4, 1975 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a citizen-taxpayer's right to vote in a school election, free of a known imperfection in the election procedure is a right which is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the 1975 decision of the Appellate Division of the Superior Court of New Jersey relative to N.J.S.A. 18A: 14-62 (Preservation of ballots, election records, etc.) violates both the Due Process and Equal Protection of Law Clauses

of the Fourteenth Amendment to the United States Constitution, in that it is vague and illogical and has the actual effect of permitting challengers in school elections to have access to the names of those voting in such elections while at the same time, by implication, endorsing the prior Appellate Division decision in 1972 which barred such access to candidates for office?

3. Whether the decision of the Appellate Division of the Superior Court of New Jersey is unreasonable, arbitrary and capricious and thus contrary to the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, in that it is based on a fact which was not established as such, at the hearing, a statute which is not relevant to the controversy and the sophistical argument of the respondents?

4. Whether the failure of the New Jersey State Board of Education, the Appellate Division of the Superior Court and the Supreme Court of New Jersey to fully respond to the complaint and argument of the petitioners that a basic flaw in the school election processes exists which is compromising the integrity of school elections throughout the state is a violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution, being a denial of the fundamental right of an opportunity to be heard?

5. Whether the pattern of in-house hearing and decision making activity within the New Jersey State Department of Education which was disclosed in the course of this action included such procedural

defects as would increase the likelihood of partiality, arbitrariness and error to such an extent that it deprived petitioners of a fair hearing contrary to the due process clause of the Fourteenth Amendment to the U.S. Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

N.J.S.A. 18A:14-18 Powers

Each challenger may in the polling district for which he is appointed

A. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen or curtain of the voting machine is closed, and ask all necessary questions to determine this right; and

B. Be present while the votes are being counted, in such position that he can observe the marking on the ballots but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof.

N.J.S.A. 18A:14-48. Poll lists; description

The board of education whall provide, and one of the election officers

designated by the judge of election, and acting as clerk of the election shall keep at each polling place, for each school election, a poll list arranged in a column or columns appropriately headed so as to indicate the election, the date thereof, and the school district and election district in which the same is used, in such manner that each voter voting in the polling place at the election may sign his name and state his address therein and the number of his official ballot may be indicated opposite the signature.

N.J.S.A. 18A:14-62. Preservation of ballots, election records, etc.

The secretary of the Board of education shall, within five days after the date of election, forward a sealed package containing a statement of the canvass of the votes in the school district, the ballots, including the irregular ballots, the poll lists and the tally sheets to the county superintendent who shall preserve them for one year.

U.S. Constitution Article XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of life, liberty or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The following named parties have been served with notice of this petition; The New Jersey State Board of Education, the State Commissioner of Education of New Jersey, the Boards of Education of the City of Lambertville, N.J. 08530, the South Hunterdon Regional High School, 08530, the Borough of Watchung, N.J. 07060 and the Watchung Hills Regional High School 07060.

The basis of the controversy stems from the decision in Shanahan v. State Board of Education 118 N.J. Super. 212 (App. Div. 1972) which affirmed a decision of the State Board of Education that the poll lists (official list of those voting at a school board election) are to be kept secret from the public, stating, "...The legislative requirement that the poll lists be sealed and retained for one year implicitly bars a public inspection of such records...." In this case the brief of the respondent State Board of Education described the function of the pertinent statute as follows, "It is to prevent candidates for school board election from appealing only to the small segment of the population which voted in the previous year's election, in their bids for election.* It is to have aired as broadly

*Petitioners contend that this is mischief involved.

as possible the public issues and the candidates under consideration in a school board election."

In February 1972, shortly after the above decision petitioner Cornell complained to the State Commissioner of Education that a challenger at a school election in the Borough of Watchung had made a list of all those who voted, stating that, "....The making of this list and its retention by any person may be judged a warping of the election laws."

After an inquiry of the matter, a decision of the Commissioner dated May 1972 relative to the use of such challenger lists subsequent to the closing of the polls stated that such conduct "...would be improper and a usurpation of the authority given to challengers pursuant to N.J.S.A. 18A:14-18" and directed, "..that any such list compiled be destroyed." (Appendix D -44) This was affirmed by the State Board of Education in November 1972. "...for the reasons expressed therein."

In February 1973 petitioner Cornell again complained to the State Commissioner of Education noting that his directive concerning the retention of challenge lists subsequent to the closing of the polls was not being followed in Watchung. At about the same time petitioner Shanahan made the same complaint to the Commissioner concerning the school election in the city of Lambertville.

After an inquiry in March 1973 the Commissioner overruled his prior decision of

May 1972 relative to the destruction of challenge lists by stating, "...The Commissioner finds in this short time since the Watchung decision that such a directive is unenforceable..." and, "The Commissioner determines that a remedy which is not enforceable cannot be applied.."

In March 1974 the State Board of Education affirmed this decision stating, "This Board agrees with the result reached by the Commissioner but not for the reason stated in his decision." And then continued, "By the same token, we hold that an official challenger has the right to make his own list of persons voting and use it and retain it in the same manner, as though he had purchased a Registry List from the County Clerk." (App. C-42) The authority given for this latter statement was N.J.S.A. 19:31-18.1, which is a regular partisan election statute.

This was appealed to the Appellate Division of the Superior Court of New Jersey wherein petitioners complained that they had been deprived of due process contrary to the provisions of the Fourteenth Amendment to the United States Constitution, Point ONE of that appeal being in part:

"The decision of the State Board...is arbitrary and capricious in that it fails to rule on the basic issue raised, namely the integrity of the school election processes, and is contrary to the provisions and requirements of the United States Constitution, Fourteenth Amendment;... by depriving the appellants of property without due process."

The Appellate Division affirmed the State Board of Education in a decision dated March 13, 1975 stating, "We find nothing in the statutory language or the statutory scheme to suggest that the sealing of the official poll lists for one year was intended to do any more than protect them as documentation of one school election for one year. Certainly, we find no indication that the requirement that those lists be sealed was designed to keep the identity of voters in one election secret until after the next ensuing election." (Appendix B - 35)

The decision answered the federal question as follows, "Finally we find no merit to appellants' arguments that the decision of the State Board of Education is arbitrary and capricious in that it failed to consider the integrity of the school election processes which is described as the basic issue raised, and that the structure of the appeals system of the Department of Education is such that it denied procedural due process to them." (Appendix B - 36)

Petition for Certification was taken to the Supreme Court of New Jersey wherein petitioners complained of two violations of their right to due process under the Fourteenth Amendment to the United States Constitution based on the following excerpts:

"2. The 1973 decision of the Commissioner and the 1974 decision of the State

Board failed to rule on the basic issue raised, ... which deprived appellant-taxpayers of property without due process, contrary to the provisions and requirements of the United States Constitution, Fourteenth Amendment...."

"3. A number of procedural errors were made in the course of the administrative process within the Department of Education which were contrary to the basic requisites of fair play. ... These... deprived appellants of their right to due process under the Fourteenth Amendment to the United States Constitution..."

The petition for certification was denied by the Supreme Court of New Jersey on June 4, 1975. (Appendix A - 27)

REASONS FOR GRANTING THE WRIT

The decision of the state court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this court.

Petitioners are citizens, voters and property owners in the school districts of Watchung, N.J. and Lambertville, N.J., both of which municipalities hold annual school elections for the purpose of electing school board members and accepting or rejecting the annual school budgets; the results of which bear directly and substantially on their local property taxes. In 1973 the average amounts of both of the above municipalities earmarked for educational purposes was 72%

of the total taxes assessed. Therefore, based on that pecuniary interest petitioners have more than an ordinary right to a fair and impartial school election, free of any known administrative flaws. Anything less has the effect of injuring them directly and individually in their tax bills.

"The system of financing public education in New Jersey relies heavily on the local property taxes."

Robinson v. Cahill 118 N.J. Super. 223, 228 (1972)

and,

"A citizen's right to a vote free of arbitrary impairment of state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, ..; or by a refusal to count votes .. or by a stuffing of the ballot box.."

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. Marbury v. Madison (US) 1 Cranch 137, 163. 2 L ed 60, 69."

Baker v. Carr 369 U.S. 186, 208 (1961)

and,

"And Colegrove v. Green, 328 U.S. 549 ..., squarely held that voters who allege

facts showing disadvantage to themselves as individuals have standing to sue."

Baker v. Carr 369 U.S. 186, 206 (1961)

The following citations are applicable in considering whether the right of the petitioners is one which is guaranteed by the Due Process Clause of the Fourteenth Amendment:

"There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, and these principles recognize the inherent rights of the individual, and are embodies and intended to be protected and secured by the fundamental law, and the Fourteenth Amendment imposes upon the courts the duty to protect every individual or corporation from arbitrary denial or abridgment of those rights by the states."

Twining v. New Jersey 211 U.S. 78, 101 (1908)

It is the contention of the petitioners that their right in the instant case is included in the above "... inherent rights of the individual, and are embodied and intended to be protected and secured by the fundamental law, ..."

In Goss v. Lopez 95 S. Ct. 729, 735-36 (1975) the Court held that,"... a student's legitimate entitlement to a public education is a property right interest which is protected by the Due Process Clause."

and found that the Ohio statute which gave principals the authority to suspend pupils for up to 10 days without any requirement of a hearing to be in violation of the Due Process Clause. Petitioners' right as taxpayers is at least comparable to students' property right interest in the benefits of the public school system.

In Pennsylvania Greyhound Lines Inc. v. Rosenthal, 14 N.J. 372, 384 (1954) the New Jersey Supreme Court stated:

"The term "vested right" is not defined in either the Federal or the State Constitution; but it would seem that, generally, the concept it expresses is that of a present fixed interest which in right reason and natural justice should be protected against arbitrary state action - an innately just and imperative right that an enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny. Such seems to be the principle of Campbell v. Holt, 115 U.S. 620, 6 S. Ct. 209, 29 L.Ed. 483 (1885).

Since the petitioners' right to the maintenance of the integrity of the school election processes is such that it essentially fits the above descriptions made by the United States Supreme Court and the Supreme Court of New Jersey of a constitutionally protected right, therefore, the following incidents of arbitrary state action to thwart that right are contrary to the Due Process Clause of the Fourteenth Amendment:

A. The decision in Shanahan v. State

Board of Education 118 N.J. Super. 212, 215 (1972) in reference to N.J.S.A. 18A: 14-62 states: "We conclude that N.J.S.A. 18A:14-61 and 62 clearly fall within the meaning of "any other statute", one of the exceptions set forth in the Right to Know Law. "The legislative requirement that the poll lists shall be sealed and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election."

Petitioners brought the instant case for the reason that the availability of the challenger lists after a school election may be permitting the existence of the same harm * to the school election processes that the decision of 1972 was designed to prevent. The Commissioner of Education saw the same point when he stated in his Decision of June 29, 1973:

"Although reasoning and logic lead the Commissioner to the conclusion that if the official poll list, compiled pursuant to statute, must be kept secret, then no copies or compilations of lists of voters' names which are tantamount to poll lists, may be kept or used after the close of the polls."

The final decision in this case decided by the Appellate Division of the

* mischief as stated on p. 6.

Superior Court of New Jersey (Affirmed by the Supreme Court of New Jersey) dated March 13, 1975 states:

"We find nothing in the statutory language or the statutory scheme to suggest that the sealing of the official poll lists for one year was intended to do any more than protect them as documentation of one school election for one year. Certainly, we find no indication that the requirement that those lists be sealed was designed to keep the identity of voters in one election secret until after the next ensuing election." ... "We do not read our opinion in Shanahan (Shanahan v. State Board of Education, 118 N.J. Super. 212 (App. Div. 1972) to suggest that the provisions of N.J.S.A. 18A: 14-61 and 62 are designed to hide from the electorate the identity of the individual voters who cast their ballots in the most recent school district election." (App. B -36)

Since the first decision concluded that N.J.S.A. 18A:14-62 falls within the exception to the Right To Know Law, (N.J.S.A. 47:1A-1) it must be presumed that the secrecy concept arises from an interpretation of the word "sealed" in the statute itself. But the second decision denies that the sealing was "...designed to keep the identity of voters in one election secret...", even though the prior decision plainly barred a plaintiff-candidate from obtaining "... the names of persons who voted in the 1971 election to solicit their support..." (see p. 14 supra) Petitioners contend that this is contra-

dictory and a play on words and whether the statutory scheme intended secrecy or not, the fact of the matter is that secrecy is the actual result. Due process has to do with what actually happens and disregards nice distinctions of legal tergiversations which are used to imply the opposite.

"Due process deals with the substance and not with the form."

National Labor Relations Board v. Townsend 185 F. 2d 378, 382 (9 Circ.)(1950)

The further reasoning that the sealing of these "perishable" lists was intended only to protect them as documentation can only be described as unrealistic in view of the existence of modern copying machines and the statutory requirements of what information these lists must contain. (See N.J.S.A. 18A:14-48, p. 4 supra) Based on above petitioners contend that the decision is contradictory, vague and illogical and violates the Due Process Clause.

"We think this case demonstrably falls within the compass of those decisions of the Court which hold that ... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law" Connaly v. General

Construction Co., 269 U.S. 385, 391 ..."

Cramp v. Board of Pub. Inst. Orange Co. 386 U.S. 278, 287 (1960)

And in Papachristou v. City of Jacksonville 405 U.S. 156, 162 (1971) it states: (concerning vagrancy law) "Living under a rule of law entails various suppositions, one of which is that (all persons) are entitled to be informed as to what the State commands or forbids."

The practical effect of this 1975 decision by the Appellate Division, affirmed by the New Jersey Supreme Court was that the challenger-witness at the inquiry was permitted to retain a list of persons who had voted at a school election, while at the same time the court was, by implication endorsing a contradictory position by not overruling the prior decision of 1972 which specifically barred a candidate-appellant from access to a similar list of voters. It is not reasonable that the same statute can arbitrarily permit one person to retain a list of voters' names while at the same time prohibiting another from obtaining the equivalent without violating the Equal Protection Clause of the Fourteenth Amendment.

B. The final decision of the Appellate Division of The Superior Court was based on the following errors which resulted in a decision which was arbitrary and capricious and so totally devoid of evidentiary support as to render it unconstitutional under the Due Process Clause of the Fourteenth

Amendment.

The errors are:

1. The decision stated that the official poll list is a perishable document, which fact was never stated, discussed or stipulated at any time during the hearing - nor is it so apparent that it can be inferred or noticed. If anything is apparent on the face of the statute cited, (N.J.S.A. 18A:14-48) it is the opposite. When the statutory requirements of the many items which must be listed on it plus, the further statutory requirement that it must be preserved for one year are taken into consideration, it is difficult to conceive how the word "perishable" can be applicable in describing it.

2. The May 1972 directive of the Commissioner to destroy the challenger lists on the basis of "...a usurpation of authority given to challengers pursuant to N.J.S.A. 18A:14-18..." (App. D-44) was reversed by the Commissioner in 1973 for the reason of unenforceability, which by implication confirmed the above statute as controlling. The State Board agreed "... with the result reached by the Commissioner and injected N.J.S.A. 18A:14-62 (poll list statute) as the controlling statute in a controversy over challenger lists, (App C -42) which concept was embraced in the decision of the Appellate Division to the extent that it stated that the sealing of the poll lists was intended to "... protect them as documentation.." Since neither the State Board nor the

Appellate Division had rejected the Commissioner's ruling as applying the wrong statute, it is more logical to conclude that they had applied the wrong one, in that they were applying the poll list statute to a ruling concerning challenger lists, which in the absence of an explanation is patently irrelevant.

3. The decision also stated (App. B -39 that, "Certainly, we find no indication that the requirement that those lists be sealed was designed to keep the identity of voters in one election secret until after the next ensuing election."

This is pure error since the decision in Shanahan v. State Board of Education, supra stated: "The legislative requirement that the poll lists shall be sealed and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election."

In Thompson v. City of Louisville 362 U.S. 199 the Court stated: "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this

conviction rests upon any evidence at all."

The above listed errors evidence that the decision is based on no proven fact or relevant supportive argument that is worthy of credence and is therefore contrary to the Due Process Clause for the reasons stated.

C. This action was initiated by complaints lodged with the New Jersey State Commissioner of Education, (as the state officer charged with the supervision of the Department of Education by N.J.S.A. 18A;) that a basic flaw in the school election system existed which might be compromising the integrity of school elections throughout the State. The facts of the complaints were later substantiated in at least one instance and the reasoning thereof (that the availability of school election challenger lists should be controlled) was apparently accepted by the Commissioner who ordered such lists destroyed as a usurpation of the authority of a challenger in his decision of May 1972. However, as to its enforcement in the school elections of 1973 he stated that even though the challenger lists "... are tantamount to poll lists,..." the order was unenforceable.

All of the ensuing appeals from this decision have raised the issue that there is a flaw in the election processes compromising the integrity of school elections throughout the state, but they were never joined by any of the answers and the only reference to it is in the final sentence of the decision of the Appellate

Division stating, "Finally we find no merit to appellants' arguments that the decision of the State Board of Education is arbitrary and capricious in that it failed to consider the integrity of the school election processes which is described as the basic issue raised..." (App. B - 36)

Is a charge of statewide error in the school election processes so frivolous and without foundation that it need not be fully investigated by the State official charged with such duty, particularly, when a second charge of illegal acts on the part of the school board concerned was substantiated at the inquiry when it was admitted by the school election officials that red and blue dots appeared on the signature copy record and that the marking of dots had been their practice through the 1970 school board election. (App. D-45) This practice was decried by the Commissioner when he stated in his directive of 1972:

"The Commissioner cannot say too strongly, however that <u>no mark</u> should be made on the signature copy record at any school board election. However he is convinced that this practice has been discontinued according to the testimony given at the inquiry."

and then directed the Secretary-Business Manager of the Watchung School Board "... to instruct future judges of elections in accordance with the directives contained herein."

So, in addition to the challenger list controversy, the initial complaint developed actual evidence of illegal activity on the part of school election officials in one of hundreds of school districts under the Commissioner's jurisdiction. Regardless of the possible purposes, the result of the pattern of activity disclosed was to preserve access to the list of those voting in school elections so that it would seem only prudent to thoroughly investigate all charges in the complaint having to do with flaws in the school election processes. This has been the gist of petitioners' appeals.

Because of the refusal of the State Board of Education to join issue on this important question and the failure of the Appellate Division to explain its affirmance, in the absence of argument by the State Board to the contrary, petitioners contend that such silence on the part of the Board and the Court is tantamount to a denial of the opportunity to be heard, in violation of the Due Process Clause of the Fourteenth Amendment. It is only logical to describe a hearing or an appeal which ignores or arbitrarily denies the argument of one side to be a hearing or an appeal-in name only.

"The fundamental requisite of due process of law is opportunity to be heard."

Pierce v. Hildebrand
103 F. Supp. 396 (USDC Iowa)
(1951)

D. Procedural errors within the hearing and appeals section of the New Jersey Department of Education amounted to a denial of the Due Process Clause of the Fourteenth Amendment, in that the pattern of activity at every level of the administrative process indicated evidences of predilections favorable to respondents, thereby denying petitioners of a fair hearing on the merits.

The system of appeals is an in-house operation beginning with an inquiry by a hearing officer, then a decision by the Commissioner and an appeal to the State Board of Education. Both of the former are salaried members of the Department of Education, subordinate to the State Board but all of them sharing responsibility for any procedural errors in administration which the instant complaint of irregularities might disclose. Their resulting subjective interest is evidenced by:

1. Action of the hearing officer at the 1973 inquiry in which he refused to permit petitioner Cornell to read the current law on the disposition of challenger lists into the record in order to refute the error of the hearing officer when he stated that the purpose of the inquiry was to establish "...whether or not she can keep the lists.." The prior decision had ordered such lists to be destroyed and the purpose of the inquiry was to establish whether the school board was complying with the directive. Since the hearing officer had denied Cornell his only opportunity to sensibly cross examine the witness and establish a

record on the matter, his case was prejudiced from the start. Presumably, the Commissioner had based his decision of unenforceability upon the record of that hearing, which, if a more thorough discussion had been allowed might have resulted in a different decision.

2. Action of the Commissioner wherein he made a finding in his decision of June 1973 that, "...in this short time since the Watchung decision, that such a directive is unenforceable," and "There is no practical way to supervise the collection or destruction of unofficial lists of voters' names and any attempt at enforcement would result in meaningless litigation."

This was conjecture on the part of the Commissioner since no examples of any unsuccessful attempts to enforce the order were included in that decision, in violation of the pertinent statutory requirement of the Administrative Procedure Act, N.J.S.A. 52:14B-10 (d) which states in part:

> "...A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact,... shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

This further denied petitioner a fair hearing for "An administrative order which is not reasonably supported by the evidence is inherently arbitrary and lacking in due

process." O.K. Corp. v. Oskey Gasoline and Oil 381 F. Supp 865, 869 (9 Circ) (1950)

and

> "The vindication of rights guaranteed by the Constitution cannot be conditioned upon the absence of practical difficulties."
>
> Orleans Parish School v. Bush 242 F 2d 156, 166 (5 Circ)(1957)

3. Certain actions by the State Board of Education when it,

a. Affirmed the Commissioner's decision "... but not for the reason stated..." The Board then introduced N.J.S.A. 18A:14-62 (poll list statute) into the controversy by stating that it "... does not govern the use or retention of the challenger's list." (Appendix C -42) To which the immediate response is that no party had ever said that it did, including the Commissioner who had said it was the challenger statute which governed. The objectivity of the Board in offering such interpretation now is somewhat suspect when it is recalled that the same issue was before it in 1972 when the Commissioner had ordered the lists destroyed. It affirmed that decision as it affirmed the instant one. Its inconsistency seems to be only in the reasons for its decisions.

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b. Switched to other arguments at the final hearing at which time petitioners were not permitted the opportunity to rebut, thereby forcing them to the further expense of seeking judicial review.

Petitioners contend that the above arbitrary acts of decision-making demonstrated a lack of objectivity and evidence of institutional bias on the part of the officials involved, to the extent that petitioners could not get a fair hearing on the merits and so were deprived of Due Process under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted

Joseph F. Shanahan
RD 2 Lambertville, New Jersey 08530
Attorney for Petitioners

Dated 29 August 1975

APPENDIX A

SUPREME COURT OF NEW JERSEY

C-545 SEPTEMBER TERM 1974

Joseph F. Shanahan

Plaintiff-Petitioner,

v.

State Board of Education, Comm. of Ed.,

Defendant-Respondent

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 4th day of June, 1975.

Florence R. Peskoe
Clerk

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2399-73
A-2417-73
(consolidated)

JOSEPH F. SHANAHAN,

Appellant,

v.

STATE BOARD OF EDUCATION,
EDWARD W. KILPATRICK, Acting
Commissioner of Education,

Respondents,

and

ROBERT J. CORNELL,

Appellant,

v.

STATE BOARD OF EDUCATION,
EDWARD W. KILPATRICK, Acting
Commissioner of Education,

Respondents.

Argued January 28, 1975 -- Decided MARCH 13, 1975

Before Judges Matthews, Fritz and Botter.

On appeal from the decision of the State Board of Education.

Mr. Joseph F. Shanahan argued the cause pro se and for appellant Cornell.

Miss Jane Sommer, Deputy Attorney General, argued the cause for respondents (Mr. William F. Hyland, Attorney General, attorney; Mr. Stephen Skillman, Assistant Attorney General, of counsel).

A statement in lieu of brief was filed by Mr. Robert J. T. Mooney, attorney for Board of Education, Borough of Watchung (Messrs. Buttermore and Mooney, attorneys).

PER CURIAM

These are consolidated appeals from decisions of the State Board of Education in the matters of the annual school elections held in the school district of Lambertville, Hunterdon County, and the school districts of the Borough of Watchung and the Watchung Hills Regional High School, Somerset County, affirming decisions of the Commissioner of Education which overruled his prior decision which had directed that any list of voters' names compiled by challengers in school district elections should be destroyed to prevent their further use after the closing of the polls.

On February 13, 1973, a school election was held in the City of Lambertville

school district in which appellant Shanahan is a resident and taxpayer. On February 22, 1973, Shanahan filed a letter of complaint with the Commissioner of Education charging that certain challengers employed at the polls in that election had left the polling places without destroying or disposing of the informal poll lists they had compiled. He requested the Commissioner to determine whether such lists had been kept by the challengers and, if so, to order them destroyed. He did not challenge the results of the election.

A hearing was held on Shanahan's petition before a hearing officer designated by the Commissioner. The hearing officer found that although the challengers who testified admitted that they had compiled informal polling lists during the election, there was no evidence either that they had removed their lists from the polling place or that such lists were still in existence at the time of the hearing. He therefore recommended that in the absence of any proof of Shanahan's allegation of election irregularities, his petition should be dismissed.

The Commissioner noted in his decision that the question raised by appellants had been considered previously in his decision, In the Matter of the Annual School Election in the School District of the Borough of Watchung, Somerset County, rendered May 11, 1972, which was affirmed by the State Board of Education. In that opinion the Commissioner found that it would not be improper for a challenger to prepare an

informal poll list. However, he noted that by statute formal poll lists must be prepared (N.J.S.A. 18A:14-28), and that within five days of the election these lists together with other specified election materials must be forwarded in a sealed package to the county superintendent to be preserved for one year. (N.J.S.A. 18A:14-62). Therefore he concluded that even though challengers' informal lists are not subject to the requirements of N.J.S.A. 18A:14-62, they should be destroyed following an election.

In reviewing Shanahan's petition, the Commissioner reconsidered his May 11, 1972 decision and overruled it insofar as it required destruction of informal poll lists, because: (1) the requirement had proven unenforceable; and (2) the list compiled by a challenger is an informal one reflecting only his observation of who has voted, while the official poll list which is the subject of statutory protection is an official compilation of voters' signatures used by election officials for purposes of comparison with the signature copy register to determine voters' eligibility to receive a ballot. N.J.S.A. 18A:14-51. Shanahan's petition was therefore dismissed.

Shanahan appealed the decision to the State Board of Education insofar as it overruled the 1972 Watchung holding. The State Board affirmed. It concluded that since, purusant to N.J.S.A. 19:31-18.1, any voter, including a challenger, may purchase a copy of the voters' registry list from the County Clerk, it was proper

for a challenger to prepare an unofficial poll list by checking off names of voters on his own copy of the registry list, and thereafter retain and remove it from the polling place without legal impediment. The State Board further concluded that N.J.S.A. 18A:14-62, which requires sealing and protection of official poll lists, does not apply to unofficial lists informally compiled by challengers.

In the second action, appellant Cornell filed a letter complaint with the Commissioner claiming that in a statement issued to the public on January 18, 1973 the Board of Education of the school district of the Borough of Watchung had indicated that it did not intend to require that challengers' informal poll lists be destroyed following the approaching school election. A hearing was held on that complaint before a hearing examiner designated by the Commissioner on the same day that the annual school election was held in the district.

Subsequently, Cornell filed complaints with the Commissioner charging that in the school district elections for both the Watchung Hills Regional and Watchung Borough districts, election officials were advised by their respective school board secretaries that challengers could prepare lists of people voting and could retain those lists, contrary to the Commissioner's decision in the 1972 Watchung case which required destruction of challengers' lists. Cornell petitioned the Commissioner to investigate these alleged irregularities and to take appropriate

action, should irregularities be found. He did not challenge the results of the elections.

A hearing was held on both complaints before a hearing examiner designated by the Commissioner. The Commissioner rendered a decision covering both complaints in which he overruled his earlier determination in the 1972 Watchung decision requiring destruction of challengers' informal poll lists for the same reasons set forth in his decision of Shanahan's petition. Accordingly, he dismissed both of Cornell's complaints.

Cornell appealed from this decision to the State Board of Education, which on March 6, 1974 affirmed the Commissioner's decision for the same reasons given in its affirmance of dismissal of Shanahan's petition on the same issue.

Both Shanahan and Cornell now appeal from the State Board's decisions. We consolidated the appeals by consent order.

The issue in each of the consolidated matters before us is whether N.J.S.A. 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, imposes upon the State Board of Education by implication the duty to require that informal challengers' lists prepared during the same election be destroyed or otherwise kept from the public for one year. The issue may best be understood by reference to the statutory scheme establishing the school election process and the signifi-

cance of poll lists within that process.

N.J.S.A. 18A:14-48 requires the designated clerk of a school district election to keep an official poll list at each polling place which is to be "arranged * * * in such manner that each voter voting in the polling place at the election may sign his name and state his address therein and the number of his official ballot may be indicated opposite the signature."

Each voter who enters the polling place during the election must give his name and address to the election official in charge of the signature copy register. N.J.S.A. 18A:14-49. That register is the same signature copy book used in general elections and is provided for comparison purposes only to the school district by the commissioner of registration of the county. N.J.S.A. 18A:14-47; 18A:14-51. Before receiving a ballot, a voter must sign his name on the official poll list, N.J.S.A. 18A:14-50, and that signature must be compared with the voter's signature in the signature copy register. N.J.S.A. 18A:14-51.

Immediately after the election, the official poll list, the tally sheets and ballots are placed in a sealed package and delivered by the inspector of election at each polling place to the secretary of the local board of education, N.J.S.A. 18A:14-61, who, in turn, "within five days after the date of the election, (shall) forward a sealed package containing a statement of the canvass of the

votes in the school district, the ballots, including the irregular ballots, the poll lists and the tally sheets to the county superintendent who shall preserve them for one year." N.J.S.A. 18A:14-62.

Thus, public inspection of official poll lists is barred for one year after a school election unless a charge of irregularity is made.

A challenger's right to make an informal list of voters' names was established by the Commissioner and the State Board in the May 1972 Watchung decision, above, and is not at issue here. Appellants argue, however, that N.J.S.A. 18A:14-62 represents an attempt by the Legislature to keep the identity of voters at a school election concealed from the general public, at least until the following election. They suggest that if voters' identities are not so concealed, the integrity of the election process is somehow harmed. They do not suggest that the outcome of either of the elections out of which these appeals arise was improperly affected, nor have they shown that the integrity of the election processes in either election has been harmed by the claimed availability of challengers' lists after the elections were concluded.

We find nothing in the statutory language or the statutory scheme to suggest that the sealing of the official poll lists for one year was intended to do any more than protect them as documentation of one school election for one year. Certainly, we find no indication that the

requirement that those lists be sealed was designed to keep the identity of voters in one election secret until after the next ensuing election.

It is apparent that the official poll list required to be kept under N.J.S.A. 18A:14-48 is a perishable document easily susceptible to mutilation, destruction or alteration, compared, for example, to the official signature copy register required to be maintained under the general election laws. The legislative concern for the integrity of the school district election process by requiring the immediate sealing and depositing of such election records is more readily understandable when that fact is considered. We have recently recognized that concern in our determination that the provisions of N.J.S.A. 18A:14-61 and 62 are exceptions to N.J.S.A. 47:1A-1 et seq., the Right To Know Law. Shanahan v. N.J. State Bd. of Education, 118 N.J. Super. 212 (App. Div. 1972). We do not read our opinion in Shanahan to suggest that the provisions of N.J.S.A. 18A:14-61 and 62 are designed to hide from the electorate the identity of the individual voters who cast their ballots in the most recent school district election. Rather, we recognized the legislative purpose of keeping the official election records, including the official poll lists, physically protected for the period of one year absent a question of election irregularity.

Finally, we find no merit to appellants' arguments that the decision of the State Board of Education is arbitrary and

capricious in that it failed to consider the integrity of the school election processes which is described as the basic issue raised, and that the structure of the appeals system of the Department of Education is such that it denied procedural due process to them.

Elizabeth McLaughlin
Clerk

Filed: April 2, 1975

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2399-73
A-2417-73
(Consolidated)

JOSEPH F. SHANAHAN)
Appellant,)
v.)
STATE BOARD OF EDUCATION,)
COMMISSIONER OF EDUCATION)
Respondents,) NOTICE OF PETITION FOR CERTIFICATION
and)
ROBERT J. CORNELL,)
Appellant,)
v.)
STATE BOARD OF EDUCATION)
COMMISSIONER OF EDUCATION)
Respondents)

Sirs:

Notice is hereby given that the appellants will petition the Supreme Court of New Jersey for Certification to the Appellate Division to review the final decision of the Appellate Division entered in this action on March 13, 1975.

Respectfully,

Joseph F. Shanahan, Esq.
Attorney for Appellants
R.D. 2, Lambertville, N.J.
(609)397-3158 08530

cc: Clerk of Appellate Division
Clerk of N.J. Supreme Court
Attorney General, State of N.J.
Other copies per Affidavit of Service

APPENDIX C

DECISION March 6, 1974

IN THE MATTER OF THE ANNUAL SCHOOL ELECTIONS HELD IN THE SCHOOL DISTRICT OF THE CITY OF LAMBERTVILLE AND IN THE SOUTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY.	:	STATE BOARD OF EDUCATION
	:	DECISION

Decided by the Commissioner of Education, June 29, 1973

This matter came on for consideration by the full Board on March 6, 1974, the complete file having been forwarded to the Board by the Acting Commissioner. Certain irregularities were alleged in the conduct of the annual school elections held on February 6, 1973 in the South Hunterdon Regional High School District and on February 13, 1973 in the City of Lambertville School District.

The complainants prayed that:

"***1. The Commissioner finds that it is improper to take challenger lists out of the polling place and that any such lists should be destroyed;

"2. That the February 13, 1973, election be declared null and void,

if in fact their allegations are true;

"3. That the Commissioner order the postponement of taking office by any of the candidates at the February 13, 1973, election until the result of this inquiry is announced;

"4. That the Commissioner order all school boards in the State to give instructions to their election workers which will insure that these alleged irregularities will not be repeated in the future.***" (Commissioner's decision of June 29, 1973.)

The hearing examiner reported that "*** Absent any proof, whatsoever, by complainants, and finding no violations by the accused as the result of his inquiry, the hearing examiner concludes that the allegations cannot be supported and recommends that they be dismissed.***"

The Commissioner, after reviewing the report of the hearing examiner, concurred with the findings therein. The Commissioner then went on to hold, "***Although reasoning and logic lead the Commissioner to the conclusion that if the official poll list, compiled pursuant to statute, must be sealed and kept secret, then no copies or compilations of lists of voters' names which are tantamount to poll lists, may be kept or used after the close of the polls.***"

He then went on to decide that

"***Although a logical extension of the Shanahan decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the Watchung decision, that such a directive is unenforceable.***"

This Board agrees with the result reached by the Commissioner, but not for the reason stated in his decision.

Copies of the Registry Lists of any election district may be furnished to any voter by the County Clerk for a fee of $0.25 per copy, pursuant to N.J.S.A. 19:31-18.1. This statute does not preclude an official challenger, who may have purchased such a list, from checking off the names of the voters who have voted and then removing the list from the polling place. This system is used by all political parties legally and has not been challenged. By the same token, we hold that an official challenger has the right to make his own list of persons voting and use it and retain it in the same manner, as though he had purchased a Registry List from the County Clerk.

We distinguish between the use and retention of the challenger's list and the sealing and the retention of the poll list by the county superintendent pursuant to N.J.S.A. 18A:14-62. This statute implicitly bars a public inspection of the official poll list; but, does not govern the use or retention of the challenger's list.

The Commissioner's decision in dismissing the Petition is affirmed for the foregoing reasons.

March 6, 1974

APPENDIX D

DECISION OF COMMISSIONER
WATCHUNG, MAY 11, 1972

. . . . . .
. . . . . .

In the instant matter, the person making the list was an official challenger and no evidence of impropriety in making such a list has been adduced.

There can be no question that the legislative intent is that after an election, the official poll list should no longer be available to the general public. That list is compiled primarily for the purpose of comparing signatures at school elections, and to be reviewed by the Commissioner or his designee on occasions when official recounts of votes cast at, or formal inquiries into such elections, are directed.

Therefore, any further use of a list of voters' names subsequent to the closing of the polls after a school election would be improper and a usurpation of the authority given to challengers pursuant to N.J.S.A. 18A:14-18, Supra.

The Commissioner directs, therefore, that any such list compiled be destroyed.

.....
.....

The Shanahan case, supra, is distinguishable from the instant matter in that his request was to see the official poll list and solicit the support of those voters for the coming school board election. However, in the Newton decision, supra, the Commissioner found no fault with challengers compiling a list of voters if the purpose of such a list was to contact eligible voters, who had not yet voted, to urge them to vote, thereby encouraging as large a turnout of voters as possible. Making such compilations is common practice.

The judge of the election and the three election workers who testified all admit that red and blue dots do appear on the signature copy record, and that the marking of dots had been their practice through the 1970 school board election.

There is clearly no statutory authority for making any such mark; however, the testimony of the election workers also shows that they were informed of this error after the 1970 school board election and that no such "dots" have been marked since. Complainant made no offer of proof at all that would discredit the testimony of the judge of the election or the election workers. The Commissioner cannot say too strongly, however, that no mark should be made on the signature copy record at any school board election. However, he is convinced that this practice has been discontinued according to the testimony given at the inquiry.

With respect to Complainant's prayer for relief that a new school election be scheduled, the Commissioner cites In re Clee, 119 N.J.L. 310, 327 (Sup. Ct. 1938) in which the Court said: "**** Irregularities on the part of election boards having no effect upon the voting *** will never vitiate an election." (at p. 329)

The Commissioner directs the Secretary-Business Manager of the Watchung School Board to instruct future judges of elections in accordance with the directives contained herein.

In all other respects, except for the specific directions given herein, the complaint is dismissed, and the results of the February 8, 1972, school board election in the school district of the Borough of Watchung will stand as announced.

COMMISSIONER OF EDUCATION

May 11, 1972

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 1975 three copies of the Petition for Writ of Certiorari were delivered to the office of William F. Hyland, Esquire, Attorney General of New Jersey, State House Annex, Trenton, N.J. 08625, attorney for respondents, and one copy each to the offices of the State Board of Education and the Commissioner of Education, 225 West State Street, Trenton, N.J. 08625. I further certify that on the same day copies of same were mailed at the Trenton Post Office, first class mail, to the following Boards of Education: City of Lambertville, South Hunterdon Regional High School, Borough of Watchung and Watchung Hills Regional High School.

Joseph F. Shanahan, Esq.
Attorney for Appellants
R.D. 2, Lambertville,
N.J. 08530

Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-318

JOSEPH F. SHANAHAN and ROBERT J. CORNELL,
Petitioners,

vs.

NEW JERSEY STATE BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-318

JOSEPH F. SHANAHAN and ROBERT J. CORNELL,
Petitioners,

vs.

NEW JERSEY STATE BOARD OF EDUCATION,
et al.,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of Question Involved

Should a writ of certiorari be granted where the sole issue of any substance decided by the state appellate court involved interpretation of a state statute, and the federal issue raised was not substantiated and was therefore found without merit by that court?

Counter-Statement of the Case

This is a petition for a writ of certiorari by two individuals who seek a ruling that N.J.S.A. 18A:14-62 precludes challengers in New Jersey school elections from taking with them after the election is over informal poll lists they may have compiled during the day of the election.

On February 13, 1973, a school election was held in Lambertville, New Jersey, school district, in which petitioner Joseph F. Shanahan (hereafter Shanahan) is a resident. By letter dated February 22, 1973, Shanahan filed a complaint with the New Jersey Commissioner of Education charging that certain challengers in that election had left the polling places without destroying or disposing of informal poll lists they had compiled. In his decision in this matter rendered on June 29, 1973, the Commissioner noted that the question raised by Shanahan had been considered before in his May 11, 1972 decision, *In the Matter of the Annual School Election in the School District of the Borough of Watchung, Somerset County,* (hereafter *Watchung, 1972*) affirmed by the State Board of Education on November 1, 1972. In that opinion the Commissioner concluded that it would not be improper for a challenger to prepare an informal poll list but that such a list would have to be destroyed following the election pursuant to N.J.S.A. 18A:14-62. Upon reconsideration of this question in connection with Shanahan's petition, the Commissioner overruled his earlier decision requiring destruction of informal poll lists, concluding in effect that N.J.S.A. 18A:14-62 applies only to official poll lists, and dismissed Shanahan's petition. On March 6, 1974 the State Board affirmed the Commissioner's decision that N.J.S.A. 18A:14-62 does not apply to informal poll lists.

By letters dated February 15 and 16, 1973, the second petitioner herein, Robert J. Cornell (hereafter Cornell), filed with the Commissioner petitions charging that in the school elections held on February 6 and 13, 1973 in the school districts of Watchung Hills and Watchung Borough, New Jersey, election officials were advised by their respective school board secretaries that challengers could prepare lists of people voting and could retain those lists, contrary to the directive in *Watchung, 1972* requiring destruction of challengers' lists. On June 29, 1973 the Commissioner rendered a decision covering both Cornell's complaints, adopting the hearing examiner's findings and finding that both school boards conducted their elections based on an understanding that *Watchung, 1972* requires only that election *officials,* not challengers, destroy informal poll lists they may have compiled. The Commissioner noted that *Watchung, 1972* contained a directive requiring destruction of challengers' lists, but overruled this directive for the same reasons set forth in his decision on Shanahan's petition, and dismissed both Cornell's complaints. Cornell appealed from this decision to the State Board of Education, which on March 6, 1974 affirmed the Commissioner's decision for the same reasons given in its affirmance of dismissal of Shanahan's petition on the same issue.

Appeals were taken by both petitioners to the Superior Court of New Jersey, Appellate Division, where they were consolidated by consent order. The State appellate court affirmed the State Board's decisions in a per curiam opinion rendered on March 13, 1975. In that decision the court agreed with the Commissioner's interpretation of the New Jersey statutes governing state school elections and found ". . . no merit to [petitioners'] arguments that the decision of the State Board of Education is arbitrary and capricious in that it failed to consider the integrity

of the school election processes. . . ., and that the structure of the appeals system of the Department of Education is such that it denied procedural due process to them."

The New Jersey Supreme Court denied petitioners' petition for certification on June 4, 1975. Petitioners filed their petition for writ of certiorari on August 29, 1975.

ARGUMENT

The Court should not grant a writ of certiorari because the sole substantive issue decided by the state appellate court involved interpretation of a state statute and the only federal issue raised was not substantiated and was therefore found without merit by that court.

It is well established that this Court generally will review the judgment of a state court on certiorari only where that court has decided a substantial federal question not previously determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court. Rule 19(1)(a).

In the instant case, the sole issue of any substance was one of state law, whether the unofficial poll lists prepared by some challengers in some New Jersey school elections are subject to the non-disclosure requirements of N.J.S.A. 18A:14-62. The State Commissioner of Education concluded that such lists are not subject to the requirements of that state statute, and the State Board of Education and the state appellate court agreed.

Before the state appellate court petitioners suggested that the State Board had failed to decide certain proced-

ural issues presented to it on appeal, and had therefore in effect denied them due process. As best could be determined from petitioners' state appellate brief, the issues they contended had not been decided by the State Board were:

1. the Commissioner's lack of jurisdiction;
2. the Commissioner's failure to document the unenforceability of *Watchung, 1972*;
3. the Commissioner's lack of authority to refuse to apply a remedy which is unenforceable;
4. the possibility that availability of challengers' lists may be rendering school elections unfair.

Even assuming *arguendo* that failure to explicitly decide an issue constitutes a denial of due process, the record below clearly reveals that the four allegedly undecided issues were in fact either decided or no longer required resolution in view of the decision reached by the State Board. First, the New Jersey Commissioner of Education has ". . . jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . or under the rules of the state board or of the commissioner . . ." N.J.S.A. 18A:6-9. This broad grant of jurisdiction necessarily encompasses controversies and disputes arising under Chapter 14 of Title 18A, that portion of the school laws governing school elections. *See, Welsh* v. *Bd. of Ed. of Tewksburg Tp.*, 7 N. J. Super. 141 (App. Div. 1950); *Du Four* v. *State Superintendent*, 72 N. J. L. 371, 372-3 (Sup. Ct. 1905); *Buren* v. *Albertson*, 54 N. J. L. 72, 73-74 (Sup. Ct. 1891). The State Board's decision to proceed with a review of the Commissioner's decision on its merits reflected the Board's correct conclusion that the Commissioner had jurisdiction

over petitioners' controversy. The Board thus by implication stated its finding on that issue. Second, as to the allegation that the Commissioner failed to document his finding of unenforceability and refused to apply an unenforceable remedy, the state appellate court was called upon to review the final administrative decision in this matter, that is, the decision of the State Board, not the Commissioner. Even assuming *arguendo* that the Commissioner should have documented his finding of unenforceability and should not have refused to apply a remedy found to be unenforceable, the State Board did not rest its decision on that finding but on its own independent reasons for overruling *Watchung, 1972,* and therefore his failure to so document was no longer material in a state appellate review of the Board's decision. Third, in contending that the Board failed to consider the impact upon school elections of the availability of challengers' lists, petitioners appear to have assumed that where the State Legislature has not acted as sweepingly as they would like, the State Board has independent authority to extend the scope of school election laws beyond that given them by the Legislature. The State Board has the authority to make and enforce rules implementing and carrying out the school laws. N.J.S.A. 18A:4-15. In petitioners' cases the State Board properly concluded that N.J.S.A. 18A:14-62 applies only to official poll lists ". . . and does not govern the use or retention of the challenger list". (Petitioners' Appendix C, page 42) Therefore even assuming petitioners could have affirmatively shown that such lists were adversely affecting the election process, the State Board would not have the authority to order such lists destroyed or otherwise kept from the public absent other sources of statutory authority.

It is apparent from the foregoing that petitioners' sole federal issue before the state appellate court was frivolous, and that court so found. Petitioners now contend that the state appellate court's failure to elaborate on its reasons for finding their federal question "without merit" was in itself a denial of due process since in their view it reflected that court's failure to "hear" their case. The state court expressly stated that it was fully cognizant of petitioners' due process argument and found it without merit. Petitioners' federal issue was thus fully "heard" and found so devoid of legal merit as to require no judicial elaboration. The absence of legal analysis of the federal question presented reflects negatively upon the question presented, not upon the state court's judgment in rejecting it.

In sum, petitioners seek a writ of certiorari to review a state court decision substantially grounded in state law, in which the federal question raised was expressly found to be totally without merit.

CONCLUSION

It is respectfully submitted that the petition should be denied because the state appellate decision of which petitioners seek review involves no substantial federal question suitable for the Court's consideration.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent State Board of Education

Supreme Court, U. S.
FILED
OCT 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-318

Joseph F. Shanahan,

Robert J. Cornell, Petitioners

v.

New Jersey State Board of Education, et al.,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

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PETITIONERS' REPLY MEMORANDUM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-318

JOSEPH F. SHANAHAN

ROBERT J. CORNELL, Petitioners

v.

NEW JERSEY STATE BOARD OF EDUCATION, et al.

Respondents

On Petition for a writ of certiorari to the Superior Court of New Jersey (Appellate Division)

PETITIONERS' REPLY MEMORANDUM

Respondent, Attorney General in the opening sentence of the Counter-Statement of the Case in Brief in Opposition makes the following error of incompleteness in stating: "This is a petition for writ of certiorari by two individuals who seek a ruling that N.J.S.A. 18A:14-62 precludes challengers in New Jersey school elections

from taking with them after the election is over informal poll lists they may have compiled during the day of election."

This describes the opening complaint but it omits to state that it was completely determined by the directive of the Commissioner dated 11 May 1972 ordering the destruction of such lists pursuant to N.J.S.A. 18A:14-18 (Petition, App. D, p. 44) and affirmed by the State Board of Education in November 1972. (Petition, p. 7). If that had been enforced as it should have been there would have been no need for further complaints by petitioners, which are evidenced by the fact that a new hearing was held by the Commissioner and appeal to the State Board which resulted in the Decision of the State Board of Education, dated March 6, 1974 (Petition, App. C, p. 40) which is the basis of the continuing appeal. This correction shows that petitioners are not seeking any ruling in the present complaint. They are seeking an enforcement of the Commissioner's directive. The reason that petitioners must clarify this point is that it does bear directly on the question of one of the administrative procedural errors listed in the Petition. (Petition, p. 23, par. D #1)

Certain other errors of fact, omission and paraphrasing are present in the Counter-Statement which, when taken together tend to give the misleading impression that the interpretation of N.J.S.A. 18A-62 is the basic factor in this

case. They are listed as follows:

ERRORS IN COUNTER-STATEMENT OF THE CASE

Error #1 - This is an error of fact and is most important to a clarification of the controversy since the question of its accuracy in regard to which statute was cited by the Commissioner is essential to the basic argument in the case, and which error is evident from the following:

Statement of the Attorney General (Counter-Statement, p.2)	Decision of Commissioner (11 May 1974) (Petition, p. 44)
In that opinion (May 11, 1972) the Commissioner concluded that it would not be improper for a challenger to prepare an informal poll list but that such a list would have to be destroyed following the election pursuant to N.J.S.A. 18A:14-62	"Therefore, any further use of a list of voters' names subsequent to the closing of the polls after a school election would be improper and a usurpation of authority given to challengers pursuant to N.J.S.A. 18A:14-18, Supra. The Commissioner directs therefore that any such list compiled be destroyed.

This patent error which cannot be discounted as a harmless one of transcription

or proof reading since it carries over into the argument on the merits and by implication into the decision of the state court. It also explains respondent's consistent adhering to the argument that the issue had to do with the interpretation of N.J.S.A. 18A:14-62 (the poll list statute) in the face of petitioners' contention that the original directive of the Commissioner (May 1972) was pursuant to N.J.S.A. 18A:14-18. (the challenger statute) (Petition, p. 18, par. 2). As further evidence that this misreading or apparent oversight has been present from the inception of the litigation, is the fact that that particular statute has never been included in any listing of Cases Cited in any of respondent's opposing briefs including this one. Since it is the underlying statute in the Commissioner's original decision, logically it should have called for some comment, in rebuttal.

Error #2 - This involves an error of omission in the Counter Statement found in the next to last sentence on page 2 of the opposing brief and evidenced by the following:

Statement by the Attorney General (Opposing Brief, p.2)	Pertinent excerpt of the holding by the Commissioner, as stated in the Decision of The State Board (Petition, p. 42)
"Upon reconsideration of this question in connection with Shanahan's petition, the Commissioner overruled his earlier decision requiring destruction of informal poll lists, concluding in effect that N.J.S.A. 18A:14-62 applies only to official poll lists, and dismissed Shanahan's petition."	"Although a logical extension of the Shanahan decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the Watchung decision, that such a directive is unenforceable."

The fact is that the above "overruling" was one in name only, since it was not reversed by overwhelming argument but was "overruled" on the ground of unenforceability only, which in effect amounts to its reaffirmance on the merits, including the statute cited. (N.J.S.A. 18A:14-18). The inclusion of the ground for the overruling negates any conclusion relative to

N.J.S.A. 18A:14-62.

Error #3 - This is an error of paraphrasing made by respondent in the Counter Statement in the last sentence on page 2 of the opposing brief and evidenced by the following:

Statement by Attorney General (Counter Statement, p. 2)	Excerpt from the Decision of the State Board of March 6, 1974) (Petition, p. 42)
"On March 6, 1974 the State Board affirmed the Commissioner's decision that N.J.S.A. 18A: 14-62 does not apply to informal poll lists."	"This Board agrees with the result reached by the Commissioner, but not for the reason stated in his decision."

This transparent revision of the Board's decision together with the above listed errors, reflect a continuing refusal, on the part of the respondent to come to grips with the real issue of the matter which is whether the school election processes in the State of New Jersey are flawed to the extent that the integrity of such elections may be compromised due to the non enforcement of the directive of May 1972 pursuant to N.J.S.A. 18A: 14-18.

REPLY TO ARGUMENT

The argument of the respondent can be divided into two parts:

1. The non federal issue as stated in the Argument which is: "The Court should not grant a writ of certiorari because the sole substantive issue decided by the state appellate court involved interpretation of a state statute....." The only support for this is stated,

> "In the instant case, the sole issue of any substance was one of state law, whether the unofficial poll lists prepared by some challengers in some New Jersey school elections are subject to the non-disclosure requirements of N.J.S.A. 18A:14-62. The State Commissioner of Education concluded that such lists are not subject to the requirements of that state statute, and the State Board of Education and the state appellate court agreed."

In answer to this, petitioners' contend that the above listed errors of the Counter Statement raise a doubt as to whether the non federal issue was decided on the basis of the proper statute, thereby raising the further question of the validity of respondent's argument that the state court's decision was based on an independent and adequate non federal ground. It is evident from the errors

that the respondent misapprehended a basic fact in the case and based its argument on same. That the state court may have been swayed by the flawed argument and arrived at a decision which it might otherwise not have, had argument based on the true fact been presented, is a question which the following comparison of the issues as stated by the respondent in its brief and by the court in its decision may shed some light:

Issue in Appellate Brief, Issue, as stated by Respondent	Issue, as stated by Appellate Court (Petition, p. 33)
"The only substantive issue in both consolidated matters before this Court is whether N.J.S.A. 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, by implication imposes upon the State Board of Education the authority to require that informal challengers' lists prepared during the same election be destroyed or otherwise kept from the public for one year. This issue and its resolution are perhaps best understood by outlining the statutory school election process and the significance of poll lists within that process."	"The issue in each of the consolidated matters before us is whether N.J.S.A. 18A:14-62, which requires that official poll lists be sealed for one year after the election in which they are compiled, imposes upon the State Board of Education by implication the duty to require that informal challengers' lists prepared during the same election be destroyed or otherwise kept from the public for one year. The issue may best be understood by reference to the statutory scheme establishing the school election process and the significance of poll lists within that process."

Since the court had accepted the respondent's version of the issue practically verbatim, it is reasonable to assume that the final conclusion, having been based upon a flawed premise is also in error. An analysis of all of the above errors shows that the poll list statute (N.J.S.A. 18A:14-62) is mentioned erroneously in all of them. It is the basis for forming the pattern of thought from which the incorrect issue was deduced.

2. The federal issue as stated in respondent's Argument is:

> ".. and the only federal issue raised was not substantiated and was therefore found without merit by that court."

This statement narrows the Reply to only the federal issues raised in the state court and substantiates it by paraphrasing material from the state appellate briefs

instead of directly attacking what are essentially the same issues in the Petition. It ignores entirely items #1, #2 and #3 of the Questions Presented (Petition, pp.2-3) which are also outlined at length starting on pages 10, 13 and 17 respectively, and which do involve issues beyond the limitation of the state court decision. Since respondent's argument to the federal issues involved were addressed only to the minor number of them which were raised in the state court and did not take direct issue with any of the federal issues as stated in the Petition under Reasons for Granting Writ, petitioners contend that those issues not directly denied should stand as admitted.

JURISDICTION

This is a case where the judgment of the state court rests upon two grounds, one of which is non federal and one of which is federal.

1. As to the non federal ground:

The above errors in the Counter Statement of the opposing brief disclose that the argument and the issue propounded by the respondent with the state court, which issue was accepted by that court as the correct one (see p. 8 above) - were based on an erroneous reading of the basic directive upon which the entire complaint rests. Petitioners contend that this has

so flawed the non federal ground of the decision that it cannot stand independent of the federal ground and is not adequate to support the judgment.

2. As to the federal ground.

The Argument of the respondent states that the only federal issue raised was not substantiated and was therefore found without merit. But the actual wording of the federal issue raised by petitioners was, "The decision of the State Board of Education ..... is arbitrary and capricious in that it fails to rule on the basic issue raised, namely, the integrity of the school election processes, ..." (Petition, p. 20, par. C) (underline added)

Petitioners contend that since the non federal issue upon which the state court based its decision is patently flawed as being based on the application of the wrong statute (N.J.S.A. 18A:14-62), the petitioners' issue should have been considered as being the correct one since it was based on the application of the correct statute. (N.J.S.A. 18A-14-18). This would have resulted in the federal right to have been found meritorious and therefore this Court has jurisdiction to review on the basis that the non federal ground is so interwoven with the federal one as not to be an independent matter.

> "And this court will review the finding of facts by a state court

where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Fiske v. Kansas 274 U.S. 380, 385-6

Also Robert Satiacum v. Washington 414-US 1

CONCLUSION

In the light of the foregoing and the fact that the basic issue is one of statewide importance having to do with safeguarding the integrity of the school election processes in the State of New Jersey which control the expenditures of hundreds of millions of dollars of taxpayer funds, the need for plenary review of the decision below is urgent.

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Dated 17 October 1975